

Memorandum 97-13

Administrative Rulemaking: Revision of Rulemaking Procedure

The attached draft of the rulemaking procedure revisions incorporates Commission decisions through the November 1996 meeting. Also attached to this memorandum as Exhibit pp. 1-3 are comments of the Northern California Association of Law Libraries (NOCALL) on the Commission decisions.

Text of Regulation

NOCALL argues for publication of the full text of the regulation (unless the regulation is so lengthy it is unreasonable to do so), and Internet access to the rulemaking process. Exhibit pp. 2-3. These matters we will consider later in connection with issues of public access to regulations and rulemaking.

It should be noted that the Commission has decided to develop a provision for notice, electronic or otherwise, to persons who have requested it when an agency submits a regulation to Office of Administrative Law for review. See also discussion in this memorandum under "Electronic Communications".

Initial Statement of Reasons

The Commission requested the staff to propose simplifications of the initial statement of reasons (Gov't Code § 11346.2(b)). The simplifications included in the attached draft are:

This statement of reasons shall include, but not be limited to, all of the following:

(1) ~~A description of the public problem, administrative requirement, or other condition or circumstance that each adoption, amendment, or repeal is intended to address.~~

(2) A statement of the specific purpose of each adoption, amendment, or repeal and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose for which it is proposed. Where the adoption or amendment of a regulation would mandate the use of specific technologies or equipment, a statement of the reasons why the agency believes these mandates or prescriptive standards are required.

(3) An identification of each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies in proposing the adoption, amendment, or repeal of a regulation.

(4)(A) A description of the alternatives to the regulation considered by the agency and the agency's reasons for rejecting those alternatives. In the case of a regulation that would mandate the use of specific technologies or equipment or prescribe specific actions or procedures, the imposition of performance standards shall be considered as an alternative.

(B) A description of any alternatives the agency has identified that would lessen any adverse impact on small business. It is not the intent of this paragraph to require the agency to artificially construct alternatives or to justify why it has not identified alternatives.

(5) Facts, evidence, documents, testimony, or other evidence upon information which the agency relies to believes may support a finding that the action will not have a significant adverse economic impact on business.

Paragraph (1) is deleted because it is subsumed by paragraph (2) — a statement of the purpose of the regulation. Paragraph (5) is revised to avoid the implication that the agency must make findings before it has conducted a hearing.

NOCALL is against eliminating or reducing any requirements. They think the burden on agencies is warranted, considering the impact of regulations on the public.

NOCALL does suggest that some duplicative effort could be eliminated where nothing has changed between the initial and final statements of reasons. This would be accomplished by allowing an agency simply to refer to, rather than restate, items that have not changed. The staff doubts this would yield significant savings, given the ease with which computerized information can be regurgitated.

Small Business Provisions

The existing rulemaking procedure includes a number of special provisions relating to small businesses. A small business is defined in Government Code Section 11342(h) as follows:

(1) "Small business" means a business activity in agriculture, general construction, special trade construction, retail trade,

wholesale trade, services, transportation and warehousing, manufacturing, generation and transmission of electric power, or a health care facility, unless excluded in paragraph (2), that is both of the following:

- (A) Independently owned and operated.
- (B) Not dominant in its field of operation.

(2) "Small business" does not include the following professional and business activities:

(A) A financial institution including a bank, a trust, a savings and loan association, a thrift institution, a consumer finance company, a commercial finance company, an industrial finance company, a credit union, a mortgage and investment banker, a securities broker-dealer, or an investment adviser.

(B) An insurance company, either stock or mutual.

(C) A mineral, oil, or gas broker; a subdivider or developer.

(D) A landscape architect, an architect, or a building designer.

(E) An entity organized as a nonprofit institution.

(F) An entertainment activity or production, including a motion picture, a stage performance, a television or radio station, or a production company.

(G) A utility, a water company, or a power transmission company generating and transmitting more than 4.5 million kilowatt hours annually.

(H) A petroleum producer, a natural gas producer, a refiner, or a pipeline.

(I) A business activity exceeding the following annual gross receipts in the categories of:

(i) Agriculture, one million dollars (\$1,000,000).

(ii) General construction, nine million five hundred thousand dollars (\$9,500,000).

(iii) Special trade construction, five million dollars (\$5,000,000).

(iv) Retail trade, two million dollars (\$2,000,000).

(v) Wholesale trade, nine million five hundred thousand dollars (\$9,500,000).

(vi) Services, two million dollars (\$2,000,000).

(vii) Transportation and warehousing, one million five hundred thousand dollars (\$1,500,000).

(J) A manufacturing enterprise exceeding 250 employees.

(K) A health care facility exceeding 150 beds or one million five hundred thousand dollars (\$1,500,000) in annual gross receipts.

The Commission has decided the special rules requiring plain English summaries and overviews of regulations affecting small businesses should be

generalized and applied to all regulations. The rationale for this decision is that (1) those special rules are salutary, and (2) in many cases it will be difficult to determine whether a regulation will affect small business, so as a practical matter the agency will need to comply with the plain English requirement anyway.

The Commission asked the staff to review the other provisions of the rulemaking statute unique to small businesses to see whether they might also be generalized. The existing rulemaking procedure includes three provisions of special applicability to small business:

- The initial statement of reasons must include a description of any alternatives the agency has identified that would lessen any adverse impact on **small business**. Section 11346.2(b)(4)(B).
- The notice of proposed action must be mailed 45 days before the end of the comment period and public hearing to a representative number of **small business** enterprises or their representatives which have been identified as being affected by the proposed action. Section 11346.4(a)(3).
- The final statement of reasons must include an explanation setting forth the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on **small businesses**. Section 11346.9(a)(5).

The arguments for generalizing these provisions are the same as the arguments for generalizing the plain English provisions — the provisions are salutary and in any event it may be difficult to determine whether or not a regulation will affect small business.

The staff has been able to identify several arguments against generalizing the special small business provisions:

(1) The provisions help ensure that the agency is sensitive to the circumstances of small business. This policy is reflected in the legislative finding, enacted as part of the rulemaking statute, that the complexity and lack of clarity in many regulations put small businesses, which do not have the resources to hire experts to assist them, at a distinct disadvantage. Section 11340(g).

(2) These provisions, while modest, do add cost and complexity to the rulemaking process; to generalize them would unnecessarily impact the agency. This consideration goes more to the added notice requirement than to the description of alternatives requirement. Agencies are required by other law to

describe the alternatives they considered, not limited to those affecting small business.

(3) Under the present system, an agency has the opportunity to limit the cost and complexity of the rulemaking process by the simple device of excluding small business from the coverage of proposed regulations. This option would be destroyed by generalization of the special small business provisions.

(4) The policy of the state to give special protection to small business is effectuated in part by the office of Small Business Advocate in the Trade and Commerce Agency. Gov't Code § 8850. The duties of this agency include advisory participation in consideration of regulations that affect small business. Gov't Code § 8850.3. Requiring agencies to self-identify regulations that will affect small business and to notify that office is a cost-effective way to implement state policy.

For these reasons, the staff recommends against generalizing the requirement of **special notice** to small business. The special notice requirement ensures that the agency pays special attention to potential impact on small business and alerts interested and affected small businesses. It also provides the agency the option of simplifying the rulemaking process by eliminating small business from the coverage of the regulation.

By preserving the special notice requirement, we can generalize the requirement that the agency describe **rejected alternatives**. In fact, agencies are already required to describe all rejected alternatives, not just those affecting small business. Small businesses will receive special notice of regulations affecting them, and will be able to examine the statements of rejected alternatives and respond.

Electronic Communications

NOCALL believes agencies should encourage and, where feasible, provide for comments to be received in the form of email or disks. Each agency could specify what form of electronic communications it is able to accept.

The Commission has preliminarily concluded that electronic communications should be permitted but not required in the rulemaking process. The attached staff draft provides:

11340.9. (a) As used in this section, "electronic communication" includes electronic transmission of written or graphical material by

electronic mail, facsimile, or other means, but does not include voice communication.

(b) Notwithstanding any other provision of this chapter that refers to mailing or to oral or written communication:

(1) An agency may permit and encourage use of electronic communication, but may not require use of electronic communication.

(2) An agency may make available in electronic form a document required by this chapter, but shall not make that the exclusive means by which the document or a copy of a document is made available.

(3) A communication required or authorized by this chapter, including a notice, public comment, request, or petition, may be made electronically with the consent of the recipient.

While this would authorize an agency to take advantage of electronic communications, this is a pretty mild form of “encouragement”. We do not know the extent to which agencies may now be equipped to handle the “information superhighway”, but state agencies as a group are being prodded in that direction. Perhaps by the time we complete this project we will actually be in a position to mandate use of electronic communications by state agencies.

Public Hearing

The Commission has decided to solicit comments concerning the advisability of a provision that would allow an agency to cancel a hearing if it requests notice from any person wishing to be heard and no person responds to the request.

NOCALL does not favor such a change. “Hearings by request puts the burden on the public to request a hearing, not just to show up for one that is scheduled and forecloses those from attending hearings just to see what comments, if any, are presented.” Exhibit p. 3.

One-year Rule

The agency has one year from the date of its notice of proposed action to complete its rulemaking process. If the rulemaking is not completed within a year, the agency must start over. Gov’t Code § 11346.4(b).

Professor Asimow believes the rulemaking process should be allowed to extend beyond one year. There may be voluminous comments that take more time to process, and rushing the rulemaking to completion may result in the comments not being properly considered. He would permit Office of Administrative Law to grant an extension of the one year period on a showing of

good cause (i.e., the agency has not procrastinated and the particular rulemaking is unusually time-consuming).

Professor Weber has indicated that he agrees with this assessment, as does NOCALL (Exhibit p. 3).

Respectfully submitted,

Nathaniel Sterling
Executive Secretary



NORTHERN CALIFORNIA ASSOCIATION OF LAW LIBRARIES

1800 Market Street
Box 109
San Francisco, CA 94102

December 30, 1996

Law Revision Commission
RECEIVED

JAN 8 1997

Nathaniel Sterling, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

File: _____

Dear Mr. Sterling:

On behalf of the Northern California Association of Law Libraries (hereafter NOCALL) an organization comprised of law librarians in the public and private sector, I submit the following comments regarding Memorandum 96-79 as a followup to the Commission's discussion of Agenda Item 14, Administrative Rulemaking, at its November 15, 1996 meeting and the Commission's recently distributed minutes from that meeting.

NOCALL is greatly interested in the preservation and access to public records. In the regulatory area, we want to make sure that government takes responsibility for insuring that the public has the ability not only to access rulemaking records but to research the intent and interpretation of regulatory language. Most of our concerns will be addressed in categories 4 and 5 of your rulemaking study agenda, which is forthcoming, however, the relevance of public access and the importance of historical and interpretative research should not be overlooked in any considerations the Commission decides involving revisions of existing rulemaking procedures.

The comments are in order of the topics covered in the memorandum:

Text of Proposed Regulation and Statements of Reason

We support the Commission's position to retain the plain English requirement, and, not the 8th grade standard, for all regulations.

Statements of Reason and Published Notice

We believe technical regulations should be explained. Presently that is done in the summaries, analyses and the statements of reason set forth by the agency in the published notice. It is our concern that the Commission not recommend eliminating or reducing the requirements of published notice and statements of reason. We feel any reduction in these requirements would compromise the public's right to hear the agency's explanation and

purpose for proposing the regulation. It also leaves a historical note when later researching the intent and interpretation of a regulation

Requiring agencies to justify their actions is not "make-shift" work when balanced against the regulatory requirements placed on businesses and members of the public. The requirement for the agency to explain itself, furthermore, acts as a check and balance on their power to regulate, further insuring that what agencies have proposed accomplishes their intent, is reasonable, and justified. A certain amount of duplicative effort that stems from agencies re-stating information in the initial and final statement can be eliminated by agencies referring to initial statements when no changes occurred after the notice and comment period. However, the notice and comment period dialogue can be important later to understanding, interpreting and implementing the regulation and should not be omitted. The present system offers a two-step review and the requirements support an open and participative government process.

Full-text Notice of Proposed Regulations

We advocate the publication of the **full text of the proposed regulation** in the Notice Register where feasible, unless the proposed regulation is so lengthy it is unreasonable to do so. This eliminates the need for the public to ask agencies for copies of the full text, and shifts the workload and expense to the consumer. The notice publication would then serve two purposes: first, all members of the public could easily access the proposed regulation text; and, second, it would provide a historical record of the proposed text, as well as the analysis. This is the way it is done in the federal regulatory area and the model should be borrowed.

Electronic Communications

More will be said about this subject under your category 4 review. Generally, though, our position is that agencies should encourage and, where feasible, provide for comments to be received in the form of email or disks. Each agency can easily specify in what form it wishes to receive comments in the published notice.

The more important issue is when are agencies going to provide web access to their rulemaking activities? The potential for greatly improving public access by offering information on the internet is significant. The full text of the proposed regulation, along with information about its present status, notice and comments and analysis could be put on the web just as information is currently available for bills in the legislative process. We need to get agencies up to speed on this. The one precaution though, is that we must be careful not to make electronic access the exclusive access to the regulatory process, because not all members of the public have internet access. Also, there needs to be an archival copy of these records. Web access, for right now, must be an additional access method to agency records, which would reduce existing burdens on agencies for reproducing paper copies.

Public Hearing

We support leaving the present form of notice in place and to abandon any proposal that hearings should be scheduled only if requested. Hearings by request puts the burden on the public to request a hearing, not just to show up for one that is scheduled and forecloses those from attending hearings just to see what comments, if any, are presented.

Response to Comments

We would recommend that comments and responses to comments be made available on theWeb. This would enhance public access. We support continuing the practice of allowing the consolidation and summarizing of the same and irrelevant comments.

Exparte Communications

Communications which influence or are relied upon by the agency should become part of the record and available for comment or analysis.

One-year Rule

We agree that some leniency should be provided in the one-year rule.

We hope these comments are helpful to the Commission's study of rulemaking procedures. NOCALL is hopeful that in the miscellaneous category of your rulemaking agenda you will invite discussions regarding the issue of content of historical notes following code sections, cross-references to the notice register, and access, preservation, archiving and electronic access to regulatory files. Thank you again for the opportunity to participate in this process.

Sincerely,



Judy Janes

NOCALL Government Relations Committee

Judy Janes, Associate Director
Law Library
University of California
Davis, California 95616
jcjan@ucdavis.edu, FAX (916)752-8766

ADMINISTRATIVE RULEMAKING

* * * * *

Electronic Communications

Electronic communications offer the promise of significant efficiencies in the rulemaking process. The proposed law includes statutory authority for agencies to permit, but not require, electronic communications in the rulemaking process.¹

REVISION OF RULEMAKING PROCEDURE

The administrative rulemaking procedure contemplates a public notice and comment process.² The Commission recommends the following revisions and clarifications of this process.

Preliminary Agency Determinations

The existing rulemaking statute requires an agency's notice of proposed rulemaking, or the accompanying initial statement of reasons, to include preliminary agency determinations on a number of matters that can only be determined after public comment and hearing has occurred.³ The statute should be revised to make clear that these preliminary determinations may be made on the basis of the agency's information and belief.

Initial Statement of Reasons

An agency proposing to engage in rulemaking must accompany its notice of proposed action with an initial statement of reasons for proposing the adoption, amendment, or repeal of the regulation.⁴ The statutory specification of the contents of the initial statement of reasons includes duplicative requirements that should be unified.⁵

Regulation that Imposes Report Requirement on Business

If an agency intends to adopt a regulation that will impose a report requirement on a business, the agency must make a finding that this is necessary for the health, safety, or welfare of the people of the state.⁶ However, the statute fails to indicate the time and place of such a finding.

1. See proposed Gov't Code § 11340.9 (electronic communications in rulemaking).

2. Gov't Code §§ 11346-11347.3.

3. See, e.g., Gov't Code §§ 11346.2(b)(5), 11346.5(a)(7)-(8) (determination of significant adverse economic impact on business); 11346.5(a)(11) (statement of significant effect on housing costs).

4. Gov't Code § 11346.2.

5. See, e.g., Gov't Code § 11346.2(b)(1) and (2).

6. Gov't Code § 11346.3.

The proposed law makes clear that the finding is to be included in the rulemaking notice.⁷ This will put the public on notice that the proposed regulation will require businesses to file a report. Interested parties may submit comments questioning the terms of the regulation or finding, where appropriate.

Plain English Requirement

Existing law requires that if a regulation will affect small business it must be drafted in plain English, or a plain English summary provided,⁸ and the informative digest prepared by the agency concerning the regulation must include a plain English policy statement overview explaining its objectives.⁹ These are salutary provisions that should be combined in the informative digest and extended to all regulations, not just those affecting small business.

However, the statutory definition of “plain English” is problematic,¹⁰ and the law provides no enforcement mechanism for the plain English requirement. A more effective provision would define plain English as language that is easily understood by those persons directly affected by it.¹¹ Existing law provides an enforcement mechanism for such a requirement by means of review by the Office of Administrative Law.¹²

Public Hearing

Existing law contemplates a public hearing on the proposed rulemaking.¹³ An agency may elect not to hold a public hearing and instead receive written comments,¹⁴ but on timely demand by an interested person the agency must schedule a public hearing.¹⁵ If a hearing is held, public comment must be permitted “either oral or in writing, or both”.¹⁶ A literal reading of this language is susceptible to the interpretation that the agency may preclude oral comment, and in fact this has occurred.¹⁷

7. See proposed new Gov’t Code § 11346.5(a)(11), *infra*.

8. Gov’t Code § 11346.2(a)(1).

9. Gov’t Code § 11345.5(a)(3)(B).

10. See Gov’t Code § 11342(e) (“language that can be interpreted by a person who has no more than an eighth grade level of proficiency in English”).

11. See Gov’t Code § 11349(c) (“clarity” defined).

12. Gov’t Code §§ 11349-11349.6.

13. Gov’t Code §§ 11346.4(a), 11346.5(a)(16), 11346.8, 11347.3(a)(8), 11349.4(a), 11349.6(d).

14. Gov’t Code § 11346.8(a) (second sentence).

15. Gov’t Code § 11346.8(a) (third sentence).

16. Gov’t Code § 11346.8(a) (first sentence).

17. See letter to California Law Revision Commission from John D. Smith, Director of Office of Administrative Law (May 24, 1996) at 13-14 (letter on file in office of California Law Revision Commission).

The proposed law revises the statute to make clear that oral testimony must be allowed at a public hearing, subject to reasonable agency limitations.¹⁸ This is consistent both with the general scheme of the rulemaking statute and with its purpose to promote effective public involvement in the rulemaking process.

The Commission also solicits comments concerning the advisability of a provision that would allow an agency to cancel a hearing if it requests notice from any person wishing to be heard and no person responds to the request.

Response to Comments

An agency is required to respond to “each objection” made concerning the proposed rulemaking.¹⁹ A response is only required, however, if the comment is directed at the proposed action or the procedures followed by the agency.²⁰ Agency practice under these rules has been to aggregate and respond to repetitive comments as a group and to summarily dispose of comments that are irrelevant. The proposed law specifically recognizes this method of dealing with repetitive or irrelevant comments.

Rulemaking File

Public inspection of file. The statutes governing the rulemaking file imply that the file is not available to the public until the rulemaking proceeding, and the record of that proceeding, is complete.²¹ It is appropriate that the public be able to view the contents of the rulemaking file from the time a regulation is proposed. A major purpose of the rulemaking statute is to promote meaningful public participation in agency rulemaking; for this purpose it is helpful to have the rulemaking file available throughout the rulemaking process. The proposed law would make clear that the rulemaking file is available for public inspection at all times during the rulemaking proceedings.²²

Documents added to file. Existing law provides for addition of documents to the rulemaking file after the close of the public hearing or comment period,²³ subject to the agency making “adequate provision” for further public comment.²⁴ The proposed law supplements these provisions with specific procedural rules,²⁵ based on existing practice.²⁶

18. See proposed amendment to Gov’t Code § 11346.8(a), *infra*.

19. Gov’t Code § 11346.9(a)(3)

20. *Ibid*.

21. Gov’t Code § 11347.3.

22. See proposed amendment to Gov’t Code § 11347.3(a), *infra*.

23. Gov’t Code § 11346.9(a)(1).

24. Gov’t Code § 11346.8(d).

25. See proposed Gov’t Code § 11347.1, *infra*.

26. 1 Cal. Code Reg. § 45.

Final statement of reasons. Despite the general statutory limitations on adding documents to the rulemaking file after the close of public comment, the law requires an agency to add a final statement of reasons.²⁷ The proposed law resolves this logical inconsistency by making clear that the addition of the final statement of reasons is an exception to the limitations on adding material to the rulemaking file after public comment.²⁸

27. Compare Gov't Code § 11346.8(d) with § 11347.3(a)(2).

28. See proposed amendment to Gov't Code § 11346.8(d), *infra*.

PROPOSED LEGISLATION

An act to amend Sections 11342, 11346.2, 11346.5, 11346.8, 11346.9, and 11347.3 of, and to add Sections 11340.9 and 11347.1 to, the Government Code, relating to administrative rulemaking.

Gov't Code § 11340.9 (added). Electronic communications in rulemaking

SEC. . Section 11340.9 is added to the Government Code, to read:

11340.9. (a) As used in this section, “electronic communication” includes electronic transmission of written or graphical material by electronic mail, facsimile, or other means, but does not include voice communication.

(b) Notwithstanding any other provision of this chapter that refers to mailing or to oral or written communication:

(1) An agency may permit and encourage use of electronic communication, but may not require use of electronic communication.

(2) An agency may make available in electronic form a document required by this chapter, but shall not make that the exclusive means by which the document or a copy of a document is made available.

(3) A communication required or authorized by this chapter, including a notice, public comment, request, or petition, may be made electronically with the consent of the recipient.

Comment. Section 11340.9 is added to facilitate use of electronic communications in rulemaking.

Subdivision (a) excludes telephonic communication, including voice mail, from the coverage of this section.

Under subdivision (b), electronic communication may be made mandatory, but may be used consensually. Paragraph (3), for example, would permit a person offering public comment (Sections 11345.8, 11349.7, 11349.8) or petitioning an agency to adopt, amend, or repeal a regulation (Section 11340.7) to do so electronically if the agency agrees to accept these communications electronically. It would also permit the agency to electronically deliver notice to a person who has agreed to receive electronic notice. Sections 11346.4, 11346.8, 11349.7.

Gov't Code § 11342 (amended). Definitions

SEC. . Section 11342 of the Government Code is amended to read:

11342. In this chapter, unless otherwise specifically indicated, the following definitions apply:

(a) “Agency” and “state agency” do not include an agency in the judicial or legislative departments of the state government.

(b) “Office” means the Office of Administrative Law.

(c) “Order of repeal” means any resolution, order or other official act of a state agency that expressly repeals a regulation in whole or in part.

(d) “Performance standard” means a regulation that describes an objective with the criteria stated for achieving the objective.

(e) “Plain English” means language that ~~can be interpreted by a person who has no more than an eighth grade level of proficiency in English~~ is clear within the meaning of Section 11349.

(f) “Prescriptive standard” means a regulation that specifies the sole means of compliance with a performance standard by specific actions, measurements, or other quantifiable means.

(g) “Regulation” means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency. “Regulation” does not mean or include legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization, or any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued.

(h) (1) “Small business” means a business activity in agriculture, general construction, special trade construction, retail trade, wholesale trade, services, transportation and warehousing, manufacturing, generation and transmission of electric power, or a health care facility, unless excluded in paragraph (2), that is both of the following:

(A) Independently owned and operated.

(B) Not dominant in its field of operation.

(2) “Small business” does not include the following professional and business activities:

(A) A financial institution including a bank, a trust, a savings and loan association, a thrift institution, a consumer finance company, a commercial finance company, an industrial finance company, a credit union, a mortgage and investment banker, a securities broker-dealer, or an investment adviser.

(B) An insurance company, either stock or mutual.

(C) A mineral, oil, or gas broker; a subdivider or developer.

(D) A landscape architect, an architect, or a building designer.

(E) An entity organized as a nonprofit institution.

(F) An entertainment activity or production, including a motion picture, a stage performance, a television or radio station, or a production company.

(G) A utility, a water company, or a power transmission company generating and transmitting more than 4.5 million kilowatt hours annually.

(H) A petroleum producer, a natural gas producer, a refiner, or a pipeline.

(I) A business activity exceeding the following annual gross receipts in the categories of:

(i) Agriculture, one million dollars (\$1,000,000).

(ii) General construction, nine million five hundred thousand dollars (\$9,500,000).

- (iii) Special trade construction, five million dollars (\$5,000,000).
- (iv) Retail trade, two million dollars (\$2,000,000).
- (v) Wholesale trade, nine million five hundred thousand dollars (\$9,500,000).
- (vi) Services, two million dollars (\$2,000,000).
- (vii) Transportation and warehousing, one million five hundred thousand dollars (\$1,500,000).

(J) A manufacturing enterprise exceeding 250 employees.

(K) A health care facility exceeding 150 beds or one million five hundred thousand dollars (\$1,500,000) in annual gross receipts.

Comment. Subdivision (e) of Section 11342 is amended to refer to the “clarity” definition of Section 11349(c) (regulations written or displayed so that their meaning will be “easily understood” by persons directly affected by them). This incorporates an enforcement mechanism for the “plain English” requirement that was previously lacking. See Sections 11349-11349.6 (review of proposed regulations). Plain English requirements may be found in Sections 11346.2 and 11346.5.

Article 5. Public Participation: Procedure for Adoption of Regulations

Gov’t Code § 11346 (no change). Application of chapter

11346. It is the purpose of this chapter to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations. Except as provided in Section 11346.1, the provisions of this chapter are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this chapter repeals or diminishes additional requirements imposed by any statute. This chapter shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.

Gov’t Code § 11346.1 (existing law). Emergency regulations

11346.1. (a) This article does not apply to any regulation not required to be filed with the Secretary of State under this chapter, and only this section and Sections 11343.4 and 11349.6 apply to an emergency regulation adopted pursuant to subdivision (b), or to any regulation adopted under Section 8054 or 3373 of the Financial Code.

(b) Except as provided in subdivision (c), if a state agency makes a finding that the adoption of a regulation or order of repeal is necessary for the immediate preservation of the public peace, health and safety or general welfare, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal.

Any finding of an emergency shall include a written statement which contains the information required by paragraphs (2) to (6), inclusive, of subdivision (a) of Section 11346.5 and a description of the specific facts showing the need for

immediate action. The enactment of an urgency statute shall not, in and of itself, constitute a need for immediate action.

The statement and the regulation or order of repeal shall be filed immediately with the office.

(c) Notwithstanding any other provision of law, no emergency regulation that is a building standard, as defined in Section 18909 of the Health and Safety Code, shall be filed, nor shall the building standard be effective, unless the building standards are submitted to the State Building Standards Commission, and are approved and filed pursuant to Sections 18937 and 18938 of the Health and Safety Code.

(d) The emergency regulation or order of repeal shall become effective upon filing or upon any later date specified by the state agency in a written instrument filed with, or as a part of, the regulation or order of repeal.

(e) No regulation, amendment, or order of repeal adopted as an emergency regulatory action shall remain in effect more than 120 days unless the adopting agency has complied with Sections 11346.2 to 11346.9, inclusive, prior to the adoption of the emergency regulatory action, or has, within the 120-day period, completed the regulation adoption process by formally adopting the emergency regulation, amendment, or order of repeal or any amendments thereto, pursuant to this chapter. The adopting agency, prior to the expiration of the 120-day period, shall transmit to the office for filing with the Secretary of State the adopted regulation, amendment, or order of repeal, the rulemaking file, and a certification that either Sections 11346.2 to 11346.9, inclusive, were complied with prior to the emergency regulatory action, or that there was compliance with this section within the 120-day period.

(f) In the event an emergency amendment or order of repeal is filed and the adopting agency fails to comply with subdivision (e), the regulation as it existed prior to the emergency amendment or order of repeal shall thereupon become effective and after notice to the adopting agency by the office shall be reprinted in the California Code of Regulations.

(g) In the event a regulation is originally adopted and filed as an emergency and the adopting agency fails to comply with subdivision (e), this failure shall constitute a repeal thereof and after notice to the adopting agency by the office, shall be deleted.

(h) A regulation originally adopted as an emergency regulation, or an emergency regulation substantially equivalent thereto that is readopted as an emergency regulation, shall not be filed with the Secretary of State as an emergency regulation except with the express prior approval of the director of the office.

Gov't Code § 11346.2 (amended). Proposed regulation and initial statement of reasons

SEC. . Section 11346.2 of the Government Code is amended to read:

11346.2. Every agency subject to this chapter shall prepare, submit to the office with the notice of the proposed action as described in Section 11346.5, and make available to the public upon request, all of the following:

(a) A copy of the express terms of the proposed regulation.

(1) The agency shall draft the regulation in plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style. ~~If the regulation affects small business, the~~ The agency shall draft the regulation in plain English, as defined in subdivision (e) of Section 11342. However, if it is not feasible to draft the regulation in plain English due to the technical nature of the regulation, the agency shall prepare a noncontrolling plain English summary of the regulation, which shall be included in the informative digest required by Section 11346.5.

(2) The agency shall include a notation following the express terms of each regulation listing the specific statutes or other provisions of law authorizing the adoption of the regulation and listing the specific statutes or other provisions of law being implemented, interpreted, or made specific by the regulation.

(3) The agency shall use underline or italics to indicate additions to, and strikethrough to indicate deletions from, the California Code of Regulations.

(b) An initial statement of reasons for proposing the adoption, amendment, or repeal of a regulation. This statement of reasons shall include, but not be limited to, all of the following:

(1) ~~A description of the public problem, administrative requirement, or other condition or circumstance that each adoption, amendment, or repeal is intended to address.~~

~~(2)~~ A statement of the specific purpose of each adoption, amendment, or repeal and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose for which it is proposed. Where the adoption or amendment of a regulation would mandate the use of specific technologies or equipment, a statement of the reasons why the agency believes these mandates or prescriptive standards are required.

~~(3)~~ (2) An identification of each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies in proposing the adoption, amendment, or repeal of a regulation.

~~(4)~~ (3) (A) A description of the alternatives to the regulation considered by the agency and the agency's reasons for rejecting those alternatives. In the case of a regulation that would mandate the use of specific technologies or equipment or prescribe specific actions or procedures, the imposition of performance standards shall be considered as an alternative.

(B) A description of any alternatives the agency has identified that would lessen any adverse impact on small business. It is not the intent of this paragraph to require the agency to artificially construct alternatives or to justify why it has not identified alternatives.

~~(5)~~ (4) Facts, evidence, documents, testimony, or other evidence upon which the agency relies to believes may support a finding that the action will not have a significant adverse economic impact on business.

(6) ~~(5)~~ A department, board, or commission within the Environmental Protection Agency, the Resources Agency, or the Office of the State Fire Marshal shall describe its efforts, in connection with a proposed rulemaking action, to avoid unnecessary duplication or conflicts with federal regulations contained in the Code of Federal Regulations addressing the same issues. These agencies may adopt regulations different from federal regulations contained in the Code of Federal Regulations addressing the same issues upon a finding of one or more of the following justifications:

(A) The differing state regulations are authorized by law.

(B) The cost of differing state regulations is justified by the benefit to human health, public safety, public welfare, or the environment.

(c) A state agency that adopts or amends a regulation mandated by federal law or regulations, the provisions of which are identical to a previously adopted or amended federal regulation, shall be deemed to have complied with subdivision (b) if a statement to the effect that a federally mandated regulation or amendment to a regulation is being proposed, together with a citation to where an explanation of the provisions of the regulation can be found, is included in the notice of proposed adoption or amendment prepared pursuant to Section 11346.5. However, the agency shall comply fully with this chapter with respect to any provisions in the regulation that the agency proposes to adopt or amend that are different from the corresponding provisions of the federal regulation.

Comment. Paragraph (a)(1) of Section 11346.2 is a specific application of Section 6215(a) (state agency “shall write each document which it produces in plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style”). The plain English requirement is broadened to apply to all regulations, and is not limited to those affecting small business. In this connection, the plain English requirement is revised to require language that “will be easily understood by those persons directly affected”, and an enforcement mechanism is incorporated. See Sections 11342(e) (“plain English”) and 11349(c) (“clarity”).

Former paragraph (b)(1) (description of problem addressed) is deleted as unnecessary; it is subsumed by paragraph (b)(1) (statement of purpose for proposed action). Paragraph (b)(5) is revised to eliminate the implication that formal findings are required before the agency has received comment on a proposed rulemaking.

Gov’t Code § 11346.3 (amended). Adverse economic impact of regulation

11346.3. (a) State agencies proposing to adopt or amend any administrative regulation shall assess the potential for adverse economic impact on California business enterprises and individuals, avoiding the imposition of unnecessary or unreasonable regulations or reporting, recordkeeping, or compliance requirements. For purposes of this subdivision assessing the potential for adverse economic impact shall require agencies, when adopting new regulations or reviewing or amending existing regulations, to adhere to the following requirements, to the extent that these requirements do not conflict with other state or federal laws:

(1) The regulations shall be based on adequate information concerning the need for, and consequences of, proposed governmental action.

(2) The state agency, prior to submitting regulations to the office, shall consider the impact on business when initiating, processing, and adopting regulations with consideration of industries affected including the ability of California businesses to compete with businesses in other states. For purposes of evaluating the impact on the ability of California businesses to compete with businesses in other states, an agency shall consider, but not be limited to, information supplied by interested parties.

It is not the intent of this section to impose additional criteria on agencies, above that which exists in current law, in assessing adverse economic impact on California business enterprises, but only to assure that the assessment is made early in the process of initiation and development of proposed regulations or amendments to regulations.

(b) (1) All state agencies proposing to adopt or amend any administrative regulations shall assess whether and to what extent it the proposed action will affect the following:

(A) The creation or elimination of jobs within the State of California.

(B) The creation of new businesses or the elimination of existing businesses within the State of California.

(C) The expansion of businesses currently doing business within the State of California.

(2) For purposes of this subdivision, "state agency" shall include every state office, officer, department, division, bureau, board, and commission, whether created by the Constitution, statute, or initiative, but shall not include the courts, an agency in the judicial or legislative branch of state government, the University of California, the Hastings College of the Law, or the Fair Political Practices Commission.

(3) Information required from state agencies for the purpose of completing the assessment may come from existing state publications.

(c) No administrative regulation adopted on or after January 1, 1993, that requires a report shall apply to businesses, unless the state agency adopting the regulation makes a finding that it is necessary for the health, safety, or welfare of the people of the state that the regulation apply to businesses.

Comment. The changes to Section 11346.3 are technical. See Section 11342(g) ("regulation" defined).

Gov't Code § 11346.4 (existing law). Notice of proposed action

11346.4. (a) At least 45 days prior to the hearing and close of the public comment period on the adoption, amendment, or repeal of a regulation, notice of the proposed action shall be:

(1) Mailed to every person who has filed a request for notice of regulatory actions with the state agency.

(2) In cases in which the state agency is within a state department, mailed or delivered to the director of the department.

(3) Mailed to a representative number of small business enterprises or their representatives which have been identified as being affected by the proposed action.

(4) When appropriate in the judgment of the state agency, mailed to any person or group of persons whom the agency believes to be interested in the proposed action and published in the form and manner as the state agency shall prescribe.

(5) Published in the California Regulatory Notice Register as prepared by the office for each state agency's notice of regulatory action.

(b) The effective period of a notice issued pursuant to this section shall not exceed one year from the date thereof. If the adoption, amendment, or repeal of a regulation proposed in the notice is not completed and transmitted to the office within the period of one year, a notice of the proposed action shall again be issued pursuant to this article.

(c) Once the adoption, amendment, or repeal is completed and approved by the office, no further adoption, amendment, or repeal to the noticed regulation shall be made without subsequent notice being given.

(d) The office may refuse to publish a notice submitted to it if the agency has failed to comply with this article.

(e) The office shall make the California Regulatory Notice Register available to the public and state agencies at a nominal cost that is consistent with a policy of encouraging the widest possible notice distribution to interested persons.

(f) Where the form or manner of notice is prescribed by statute in any particular case, in addition to filing and mailing notice as required by this section, the notice shall be published, posted, mailed, filed, or otherwise publicized as prescribed by that statute. The failure to mail notice to any person as provided in this section shall not invalidate any action taken by a state agency pursuant to this article.

Gov't Code § 11346.5 (amended). Contents of notice of proposed action

SEC. . Section 11346.5 of the Government Code is amended to read:

11346.5. (a) The notice of proposed adoption, amendment, or repeal of a regulation shall include the following:

(1) A statement of the time, place, and nature of proceedings for adoption, amendment, or repeal of the regulation.

(2) Reference to the authority under which the regulation is proposed and a reference to the particular code sections or other provisions of law that are being implemented, interpreted, or made specific.

(3) An informative digest containing a concise and clear summary of existing laws and regulations, if any, related directly to the proposed action and the effect of the proposed action. The informative digest shall be drafted in a format similar to the Legislative Counsel's digest on legislative bills.

(A) If the proposed action differs substantially from an existing comparable federal regulation or statute, the informative digest shall also include a brief description of the significant differences and the full citation of the federal regulations or statutes.

~~(B) If the proposed action affects small business, the~~ The informative digest shall also include a plain English summary of the regulation and policy statement overview explaining the broad objectives of the regulation and, if appropriate, the specific objectives.

(4) Any other matters as are prescribed by statute applicable to the specific state agency or to any specific regulation or class of regulations.

(5) A determination as to whether the regulation imposes a mandate on local agencies or school districts and, if so, whether the mandate requires state reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4.

(6) An estimate, prepared in accordance with instructions adopted by the Department of Finance, of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state.

For purposes of this paragraph, “cost or savings” means additional costs or savings, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations.

(7) If a state agency, in proposing to adopt or amend any administrative regulation, ~~determines~~ believes that the action may have a significant adverse economic impact on business, including the ability of California businesses to compete with businesses in other states, it shall include the following information in the notice of proposed action:

(A) Identification of the types of businesses that would be affected.

(B) A description of the projected reporting, recordkeeping, and other compliance requirements that would result from the proposed action.

(C) The following statement: “The (name of agency) ~~finds~~ believes that the (adoption/amendment) of this regulation may have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states. The (name of agency) (has/has not) considered proposed alternatives that would lessen any adverse economic impact on business and invites you to submit proposals. Submissions may include the following considerations:

(i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.

(ii) Consolidation or simplification of compliance and reporting requirements for businesses.

(iii) The use of performance standards rather than prescriptive standards.

(iv) Exemption or partial exemption from the regulatory requirements for businesses.”

(8) If a state agency, in adopting or amending any administrative regulation, ~~determines~~ believes that the action will not have a significant adverse economic impact on business, including the ability of California businesses to compete with businesses in other states, it shall make a declaration to that effect in the notice of proposed action. In making this ~~determination~~ declaration, the agency shall provide in the record facts, evidence, documents, testimony, or other evidence upon which the agency relies to support that ~~finding~~ belief.

An agency’s ~~determination~~ belief and declaration that a proposed regulation may have or will not have a significant, adverse impact on businesses, including the ability of California businesses to compete with businesses in other states, shall not be grounds for the office to refuse to publish the notice of proposed action.

(9) A statement of the potential cost impact of the proposed action on private persons or businesses directly affected, as considered by the agency during the regulatory development process.

For purposes of this paragraph, “cost impact” means the reasonable range of costs, or a description of the type and extent of costs, direct or indirect, that a representative private person or business necessarily incurs in reasonable compliance with the proposed action.

(10) A statement of the results of the assessment required by subdivision (b) of Section 11346.3.

(11) The finding prescribed by subdivision (c) of Section 11346.3, if required.

(12) A statement that the action ~~would~~ may have a significant effect on housing costs, if a state agency, in adopting, amending, or repealing any administrative regulation, ~~determines~~ believes that the action would have an effect. In addition, the agency officer designated in paragraph ~~(13)~~ (14), shall make available to the public, upon request, the agency’s evaluation, if any, of the effect of the proposed regulatory action on housing costs.

~~(12)~~ (13) A statement that the adopting agency must determine that no alternative considered by the agency would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

~~(13)~~ (14) The name and telephone number of the agency officer to whom inquiries concerning the proposed administrative action may be directed.

~~(14)~~ (15) The date by which comments submitted in writing must be received to present statements, arguments, or contentions in writing relating to the proposed action in order for them to be considered by the state agency before it adopts, amends, or repeals a regulation.

~~(15)~~ (16) Reference to the fact that the agency proposing the action has prepared a statement of the reasons for the proposed action, has available all the information upon which its proposal is based, and has available the express terms of the proposed action, pursuant to subdivision (b).

~~(16)~~ (17) A statement that if a public hearing is not scheduled, any interested person or his or her duly authorized representative may request, no later than 15 days prior to the close of the written comment period, a public hearing pursuant to Section 11346.8.

(17) (18) A statement indicating that the full text of a regulation changed pursuant to Section 11346.8 will be available for at least 15 days prior to the date on which the agency adopts, amends, or repeals the resulting regulation.

(b) The agency officer designated in paragraph ~~(13)~~ (14) of subdivision (a) shall make available to the public upon request the express terms of the proposed action. The officer shall also make available to the public upon request the location of public records, including reports, documentation, and other materials, related to the proposed action.

(c) This section shall not be construed in any manner that results in the invalidation of a regulation because of the alleged inadequacy of the notice content or the summary or cost estimates, or the alleged inadequacy or inaccuracy of the housing cost estimates, if there has been substantial compliance with those requirements.

Comment. Subdivision (a)(3)(B) of Section 11346.5 is amended to broaden the plain English policy statement overview to apply to all proposed actions, and is not limited to those affecting small business. The informative digest is expanded to include a plain English summary of the regulation, whether or not such a summary is required by Section 11346.2(a)(1). In this connection, the plain English requirement is revised to require language that “will be easily understood by those persons directly affected”, and an enforcement mechanism is incorporated. See Sections 11342(e) (“plain English”) and 11349(c) (“clarity”).

Paragraphs (a)(7), (8) and (12) are revised to eliminate the implication that formal findings are required before the agency has received comment on a proposed rulemaking.

A new subdivision (a)(11) is added to include the finding that it is necessary for the health, safety, or welfare of the people of the state that a regulation requiring a report apply to businesses. This implements Section 11346.3(c).

Note. The Commission solicits comments concerning the advisability of a provision that would allow an agency to cancel a hearing if it requests notice from any person wishing to be heard and no person responds to the request.

Gov’t Code § 11346.54 (existing law). Assessment of economic impact

11346.54. (a) All state agencies proposing to adopt or amend any administrative regulation shall assess whether and to what extent it will affect the following:

- (1) The creation or elimination of jobs within the State of California.
- (2) The creation of new businesses or the elimination of existing businesses within the State of California.
- (3) The expansion of businesses currently doing business within the State of California.

(b) For purposes of this section, "state agency" shall include every state office, officer, department, division, bureau, board, and commission, whether created by the Constitution, statute, or initiative, but shall not include the courts, an agency in

the judicial or legislative branch of state government, the University of California, the Hastings College of the Law, or the Fair Political Practices Commission.

(c) The state agency shall include a statement of the results of this assessment in the notice of proposed action.

(d) Information required from state agencies for the purpose of completing this assessment may come from existing state publications.

Gov't Code § 11346.8 (amended). Public hearing and comment

SEC. . Section 11346.8 of the Government Code is amended to read:

11346.8. (a) If a public hearing is held, both oral and written statements, arguments, or contentions, ~~either oral or in writing, or both~~, shall be permitted. The agency may impose reasonable limitations on oral presentations. If a public hearing is not scheduled, the state agency shall, consistent with Section 11346.4, afford any interested person or his or her duly authorized representative, the opportunity to present statements, arguments or contentions in writing. In addition, a public hearing shall be held if, no later than 15 days prior to the close of the written comment period, an interested person or his or her duly authorized representative submits in writing to the state agency, a request to hold a public hearing. The state agency shall, to the extent practicable, provide notice of the time, date, and place of the hearing by mailing the notice to every person who has filed a request for notice thereby with the state agency. The state agency shall consider all relevant matter presented to it before adopting, amending, or repealing any regulation.

(b) In any hearing under this section, the state agency or its duly authorized representative shall have authority to administer oaths or affirmations. An agency may continue or postpone a hearing from time to time to the time and at the place as it determines. If a hearing is continued or postponed, the state agency shall provide notice to the public as to when it will be resumed or rescheduled.

(c) No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. If a sufficiently related change is made, the full text of the resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends, or repeals the resulting regulation. Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9.

(d) No state agency shall add any material to the record of the rulemaking proceeding after the close of the public hearing or comment period, unless adequate provision is made for public comment on that matter. This subdivision does not apply to the final statement of reasons.

Comment. Subdivision (a) of Section 11346.8 is amended to make clear that oral testimony must be allowed at a public hearing, subject to reasonable time, repetition, or other limitations by the agency.

Subdivision (d) is amended to recognize that the final statement of reasons is added to the record of the rulemaking proceeding after the close of the hearing or comment period. See Sections 11346.9 (final statement of reasons and updated informative digest), 11347.3 (rulemaking file). If the final statement of reasons refers to documents not previously included in the record of the rulemaking proceeding, the addition of those documents to the rulemaking file is governed by Section 11347.1 (documents added to rulemaking file).

Gov't Code § 11346.9 (amended). Final statement of reasons and updated informative digest

SEC. . Section 11346.9 of the Government Code is amended to read:

11346.9. Every agency subject to this chapter shall do the following:

(a) Prepare and submit to the office with the adopted regulation a final statement of reasons that shall include all of the following:

(1) An update of the information contained in the initial statement of reasons. If the update identifies any data or any technical, theoretical or empirical study, report, or similar document on which the agency is relying in proposing the adoption or amendment of a regulation that was not identified in the initial statement of reasons, or which was otherwise not identified or made available for public review prior to the close of the public comment period, the agency shall comply with ~~subdivision (d) of Section 11346.8~~ Section 11347.1.

(2) A determination as to whether the regulation imposes a mandate on local agencies or school districts. If the determination is that the regulation does contain a local mandate, the agency shall state whether the mandate is reimbursable pursuant to Part 7 (commencing with Section 17500) of Division 4. If the agency finds that the mandate is not reimbursable, it shall state the reasons for that finding.

(3) A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action. The agency may aggregate and summarize repetitive or irrelevant comments as a group, and may respond to repetitive comments or summarily dismiss irrelevant comments as a group.

(4) A determination with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation.

(5) An explanation setting forth the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on small businesses.

(b) Prepare and submit to the office with the adopted regulation an updated informative digest containing a clear and concise summary of the immediately

preceding laws and regulations, if any, relating directly to the adopted, amended, or repealed regulation and the effect of the adopted, amended, or repealed regulation. The informative digest shall be drafted in a format similar to the Legislative Counsel's Digest on legislative bills.

(c) A state agency that adopts or amends a regulation mandated by federal law or regulations, the provisions of which are identical to a previously adopted or amended federal regulation, shall be deemed to have complied with this section if a statement to the effect that a federally mandated regulation or amendment to a regulation is being proposed, together with a citation to where an explanation of the provisions of the regulation can be found, is included in the notice of proposed adoption or amendment prepared pursuant to Section 11346.5. However, the agency shall comply fully with this chapter with respect to any provisions in the regulation which the agency proposes to adopt or amend that are different from the corresponding provisions of the federal regulation.

Comment. Subdivision (a)(1) of Section 11346.9 is amended to cross-refer to the newly-created procedure governing addition of documents to the rulemaking file. See Section 11347.1.

Subdivision (a)(3) recognizes the existing practice of grouping repetitive comments and summarily dismissing irrelevant for purposes of this section.

Gov't Code § 11347.1 (added). Documents added to rulemaking file

SEC. . Section 11347.1 is added to the Government Code, to read:

11347.1. (a) An agency that adds any technical, theoretical, or empirical study, report, or similar document to the rulemaking file after publication of the notice of proposed action and relies on the document in proposing the adoption, amendment, or repeal of the regulation shall make the document available as required by this section.

(b) At least 15 calendar days before the adoption, amendment, or repeal of the regulation, the agency shall mail to all of the following persons a notice identifying the added document and stating the place and business hours that the document is available for public inspection:

- (1) Persons who testified at the public hearing.
- (2) Persons who submitted written comments at the public hearing.
- (3) Persons whose comments were received by the agency during the public comment period.
- (4) Persons who requested notification from the agency of the availability of changes to the text of the regulation.

(c) Documents shall be available for public inspection at the location described in the notice for at least 15 calendar days before adoption of the regulation.

(d) Written comments on the documents or information received by the agency during the availability period shall be summarized and responded to in the final statement of reasons as provided in Section 11346.9.

(e) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date on which the notice was mailed.

(f) If there are no persons in categories listed in subdivision (b), then the rulemaking record shall contain a confirming statement to that effect.

Comment. Section 11347.1 implements Section 11346.9(a)(1) by prescribing a more detailed procedure than that provided in Section 11346.8(d). It is drawn from 1 California Code of Regulations § 45.

Gov't Code § 11347.3 (amended). Rulemaking file

SEC. . Section 11347.3 of the Government Code is amended to read:

11347.3. (a) Every agency shall maintain a file of each rulemaking that shall be deemed to be the record for that rulemaking proceeding. Commencing no later than the date that the rulemaking notice is published in the California Regulatory Notice Register, and during all subsequent periods of time that the file is in the agency's possession, the agency shall make the file available to the public for inspection and copying during regular business hours. The file shall include:

(1) Copies of any petitions received from interested persons proposing the adoption, amendment, or repeal of the regulation, and a copy of any decision provided for by subdivision (d) of Section 11340.7, which grants a petition in whole or in part.

(2) All published notices of proposed adoption, amendment, or repeal of the regulation, and an updated informative digest, the initial statement of reasons, and the final statement of reasons.

(3) The determination, together with the supporting data required by paragraph (5) of subdivision (a) of Section 11346.5.

(4) The determination, together with the supporting data required by paragraph (8) of subdivision (a) of Section 11346.5.

(5) The estimate, together with the supporting data and calculations, required by paragraph (6) of subdivision (a) of Section 11346.5.

(6) All data and other factual information, any studies or reports, and written comments submitted to the agency in connection with the adoption, amendment, or repeal of the regulation.

(7) All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment, or repeal of a regulation, including any cost impact estimates as required by Section 11346.3.

(8) A transcript, recording, or minutes of any public hearing connected with the adoption, amendment, or repeal of the regulation.

(9) The date on which the agency made available to the public for 15 days prior to the adoption, amendment, or repeal of the regulation the full text as required by subdivision (c) of Section 11346.8 if the agency made changes to the regulation noticed to the public.

(10) The text of regulations as originally proposed and the modified text of regulations, if any, that were made available to the public prior to adoption.

(11) Any other information, statement, report, or data that the agency is required by law to consider or prepare in connection with the adoption, amendment, or repeal of a regulation.

(12) An index or table of contents that identifies each item contained in the rulemaking file. The index or table of contents shall include an affidavit or a declaration under penalty of perjury in the form specified by Section 2015.5 of the Code of Civil Procedure by the agency official who has compiled the rulemaking file, specifying the date upon which the record was closed, and that the file or the copy, if submitted, is complete.

(b) Every agency shall submit to the office with the adopted regulation, the rulemaking file or a complete copy of the rulemaking file.

(c) The agency file of the rulemaking proceeding shall be made available by the agency to the public, and to the courts in connection with the review of the regulation.

Comment. Subdivision (a) of Section 11347.3 is amended to make clear that the rulemaking file is available to the public throughout the rulemaking process. *Cf.* subdivision (c) (file shall be made available to the public).